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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-390

VANCE C. DYAR,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Vance C. Dyar, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit made and entered in the above titled cause on June 16, 1978 and August 9,

1978.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit announced on June 16, 1978 is reproduced as Appendix A. The judgment of the United States Court of Appeals for the Fifth Circuit is reproduced as Appendix B. The denial of rehearing by the United States Court of Appeals for the Fifth Circuit is reproduced as Appendix C.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on June 16, 1978. The denial of the Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit was entered on August 9, 1978. This Petition for a Writ of Certiorari is timely filed within thirty days of the

date of the denial of the Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit. Jurisdiction is invoked pursuant to the provisions of 28 U.S.C., §1254(1) and Rule 19 (1) (b) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

QUESTION PRESENTED

The question presented for review is:

1. Whether or not a single agreement can be divided in such manner as to charge a Defendant with multiple conspiracies under the Comprehensive Drug Abuse, Prevention and

Control Act of 1970.

STATEMENT OF THE CASE

This petition seeks to review judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the Petitioner's conviction in the United States District Court for the Middle District of Florida, said case being numbered 77-45-Dr-J-T.

A two count indictment was brought against your Petitioner and Mark M. Streeter, Richard B. Barker, Clement J. DeMatto, Gary L. Pagles, Peter S. Penrose and Neal M. Perks. The indictment charged the Defendants in one count of violation of Title 21 §846 Conspiracy to possess with intent to distribute, and one count of violation of Title 21 U.S.C. 963 Conspiracy to import marijuana.

Only Petitioner, Mark M. Streeter and Clement

J. DeMatto were tried on the 8th day of June, 1977. On June 14, 1977, the jury returned a verdict of guilty on both counts as to all Defendants.

The Judge on July 25, 1977, adjudged Petitioner, Vance C. Dyar, guilty of two counts as set out in the indictment and sentenced Petitioner to four years in the custody of the United States Attorney General, said sentences were to be served concurrently.

Petitioner filed timely notice of appeal to the Untied States Court of Appeals for the Fifth Circuit. On June 16, 1978, Petitioner's conviction was affirmed by the United States Court of Appeals for the Fifth Circuit and a Petition for Rehearing was timely filed and said Petition was denied by the Court of Appeals on August 9, 1978. A petition for stay of the mandate was filed on August 16, 1978 and an order granting a stay of the

mandate pending the Petition for Certiorari was granted on August 22, 1978.

The Government's proof of the facts are as follows: that the Petitioner and Defendants Gary L. Pagles, Mark M. Streeter, Clement J. DeMatto and Government's Witness, David Fleming, met in a motel room in Memphis, Tennessee wherein a conspiracy was formed to fly to Columbia, South America and return to the United States with a quantity of marijuana.

Subsequently to the meeting in the motel room in Memphis, Tennessee, Petitioner, Gary Pagles and Government witness, David Fleming, proceeded about the business of renting an aircraft in order to fly to Columbia, South America.

On August 15, 1978, two of the Defendants leased an aircraft from Hankins Air Service in Jackson,

Mississippi and the airplane was flown by Government witness, David Fleming, to Mobile, Alabama. There the aircraft was fueled and certain equipment removed from the aircraft in order to make room for the cargo to be loaded in Columbia, South America. Shortly thereafter, Government witness, David Fleming and Defendants Vance Dyar and Neal Perks left the Mobile airport to make the trip to Columbia, South America, but the aircraft developed radio failure in the Ocala, Florida area and the flight was aborted.

After several days, the radio malfunction was corrected and the Government witness, David Fleming, and Defendant Neal Perks flew to Columbia, South America where they were met by a Defendant with the name of Barker, who along with several other individuals, loaded what appeared to be marijuana onto the aircraft. The

following morning, the aircraft returned to Keystone Heights, Florida. Several hours after the aircraft had landed, the airport manager became suspicious and notified the local authorities, who then without a search warrant, went into the aircraft and discovered what appeared to be bales of marijuana which were confiscated.

The Government's proof shows that only one meeting took place where any conspiracy could have developed and that subsequently several individuals involved in the conspiracy caused certain overt acts to be committed in futherance of the agreement reached in Memphis, Tennessee at the one meeting in a motel.

REASONS FOR GRANTING THE WRIT

The decision by the Court of Appeals for the Fifth Circuit in this case is in direct conflict with the cases decided by the First and Sixth Circuits.

The Petitioner has been placed in double jeopardy in violation of the Fifth Amendment to the Constitution of the United States in that the Government has charged the Petitioner with two separate and distinct conspiracies when in fact only one conspiracy existed. [The two conspiracies arrived from the same transaction and same conspiracy, namely, the one meeting at a motel in Memphis, Tennessee.]

In affirming the Petitioner's conviction, the Court of Appeals for the Fifth Circuit has ruled in direct conflict with the First Circuit in United States v. Honneus, 508 F.2d 566 (1974) and the Sixth Circuit in United States v. Adcock, 487 F. 2d 637 (1973). In the case of United States v. Maiotta, 518 F. 2d (1975) the Ninth Circuit, in ruling on the identical question, took the same position as that of the Fifth Circuit in the present case. Therefore, two Circuits have ruled in direct conflict with two

other Circuits.

The United States Supreme Court in Braverman v. United States, 63 S. Ct. 99,87 L.Ed. 23 (1942) stated:

> "Where the object of a single agreement is to commit one or more crimes, it is in either case that agreement which constitutes the conspiracy which the statue punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisions the violation of several statues rather than one."

Recognition of the confict of Circuits was pronounced by the Fifth Circuit in the case of United States v. Houltin, 25 F. 2d 943 (1976) wherein that Court said we "even the score at two-two." The Fifth Circuit, in so ruling, relied on Gore v. United States, 78 S.Ct. 1288, 2 L.Ed. 2d 1405 (1958) wherein the Supreme Court of the United States ruled that the single sale of narcotics violated three different narcotics statutes. In looking at the legislative history of the three

different enactments, the Supreme Court stated:

> "If the legislation reveals anything, it reveals the determination of Congress to turn the screw of the criminal machinery-detection, prosecution and punishment — tighter and tighter. The three penal laws for which Petitioner was convicted had different origins both in time and in design."

In the present case, the Fifth Circuit overlooked the fact that this was not a case where the legislature showed an intent to turn the screw tighter and tighter, but instead, passed a uniform act known as the Comprehensive Drug Abuse, Prevention and Control Act of 1970. The fundamental criteria for determining whether or not two distinct offenses have been committed was more fully set out by Mr. Chief Justice Warren in his dissent in the Gore case wherein he stated:

> "Where the legislature has failed to make its intention manifest, Court should proceed cautiously remaining sensitive to the interest of defendant and society alike. All relevant

> criteria must be considered and the most useful aid will often be common sense. In this case, I am persuaded, on the basis of the origins of the three statutes involved, the text and background of recent amendments to these statutes, the scale of punishment perscribed for second and third offenders, and the evident legislative purpose to achieve uniformity in sentence, that the present purpose of these statutes is to make sure that a prosecutor has three avenues by which to prosecute one who traffics in narcotics, and not to authorize three cumulative punishments for the defendant who consumates a single sale."

The Petitioner urges the Court that it was the Congressional intent when passing the Comprehensive Drug Abuse, Prevention and Control Act of 1970, that the two conspiracy sections were prosectorial tools for the prosecution of anyone engaged in conspiring to import a controlled substance or conspiring to possess with intent to distribute a controlled substance, but Congress only intended to punish conspiracies to violate the Controlled Substance Act.

CONCLUSION

For the reasons that two United States Circuit Courts of Appeal have ruled in direct conflict with two other United States Circuit Courts of Appeal, the Supreme Court should issue a Writ of Certiorari to review and to reverse the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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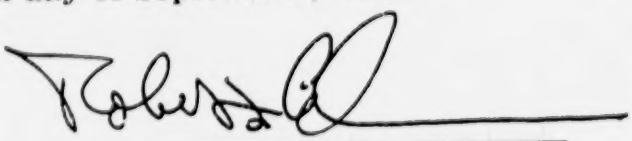
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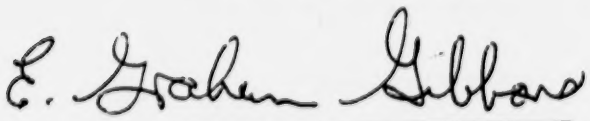
CERTIFICATE OF SERVICE

This is to certify that we, Robert F. Clark and E. Graham Gibbons, the Attorneys for Petitioner, Vance C. Dyar, have this day mailed, postage prepaid, three true and correct copies of the foregoing Petition for Writ of Certiorari to Honorable John Briggs, United States Attorney, P. O. Box 600, Jacksonville, Florida 32201; three true and correct copies to Honorable Robert G. Gilder, Attorney for Mark M. Streeter, P. O. Box 193, Southaven, Mississippi 38671; and three true and correct copies to the Solicitor General, Department of Justice, Washington, D. C. 20530.

This the 5th day of September, 1978.



ROBERT F. CLARK



E. GRAHAM GIBBONS

UNITED STATES of America, Plaintiff-Appellee,

v.

Vance DYAR, Mark M. Streeter, and Clement J. DeMatto, Defendants-Appellants.

No. 77-5481.

United States Court of Appeals, Fifth Circuit.

June 16, 1978.

Defendants were convicted before the United States District Court for the Middle District of Florida, at Jacksonville, George C. Young, Chief Judge, of conspiracy to import marijuana and conspiracy to possess with intent to distribute marijuana, and they appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) evidence was insufficient to adequately connect one defendant, whose conviction was supported only by suspicion and a ten-minute association with actual conspirators, with conspiracy; (2) evidence was sufficient to support conviction of another defendant; (3) indictment was not duplicitous, and (4) two defendants lacked standing to contest legality of search of aircraft which allegedly led to discovery of government witness's identity.

Affirmed in part and reversed in part and remanded.

1. Conspiracy ⇐47(12)

Evidence was insufficient to adequately connect one defendant, whose conviction was supported only by suspicion and a ten-minute association with the actual conspirators, with conspiracy to import marijuana and to possess with intent to distribute marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

2. Conspiracy ⇐47(1)

Before being entitled to conviction, Government must prove by evidence beyond a reasonable doubt not only that conspiracy did in fact exist, but also that defendant knew of it and with that knowledge agreed to take part in it; suspicion is not enough and guilty participation in conspiracy may not be inferred from mere association.

3. Conspiracy ⇐47(12)

Evidence, from which reasonably minded jury could infer that defendant most assuredly knew of conspiracy, that his interest in it exceeded that of uninvolved bystander, and that he had vital stake in concealing it, was sufficient to support conviction of defendant, who was in and out of motel room during discussions about marijuana run and who, after codefendant's arrest, discussed with such codefendant alibi given to police, of conspiracy to import and possess with intent to distribute marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

4. Criminal Law ⇐200(6)

Indictment charging defendants with conspiracy to possess with intent to distribute and conspiracy to import marijuana was not duplicitous and thus multiple punishments imposed were not in derogation of defendants' constitutional guarantee against double jeopardy; moreover, defendants received concurrent sentences on the two counts. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

5. Searches and Seizures ⇐7(26)

Decisive factor in challenging search is whether complaining individual had reasonable expectation of privacy in premises searched or things searched; generally, a defendant will satisfy standing requirements if he has proprietary or possessory interest in place searched or objects seized adequate to give rise to reasonable expectation of privacy, if he was on premises at time of contested search and seizure, or if he is charged with offense that includes as an essential element possession of seized evidence.

6. Searches and Seizures ⇐7(26)

Traditional or common-law theories of property rights do not automatically confer standing to challenge a search; property rights in absence of reasonable expectations of privacy in property cannot support a Fourth Amendment claim but, rather, ownership or leasehold interest must be accompanied by cognizable privacy interest in place of thing searched. U.S.C.A.Const. Amend. 4.

7. Searches and Seizures ⇐7(26)

Even if defendants had leasehold interest in searched aircraft sufficient to create traditional property right, when they gave possession to pilot they abandoned any expectation of personal privacy in aircraft, and thus lacked standing to contest legality of search which resulted in discovery of identity of pilot, who subsequently testified for Government against defendants. U.S.C.A. Const. Amend. 4.

8. Searches and Seizures ⇐7(26)

Defendants, who not only failed to satisfy reasonable expectation of privacy requirement for Fourth Amendment test of standing, but were not victims of aircraft search or ones against whom search was directed, were merely persons claiming prejudice through introduction of damaging evidence gathered as consequence of search directed at someone else, and thus could not assert Fourth Amendment rights of pilot, whose identity was learned through search of aircraft and who subsequently testified for Government against defendants. U.S.C. A.Const. Amend. 4.

Appeals from the United States District Court for the Middle District of Florida.

Before TUTTLE, COLEMAN, and CLARK, Circuit Judges.

COLEMAN, Circuit Judge.

Clement J. DeMatto, Mark M. Streeter, and Vance Dyar appeal their convictions of conspiracy to import marijuana, 21 U.S.C., § 963 (Supp., 1978), and of conspiracy to possess with intent to distribute marijuana, 21 U.S.C., § 846 (Supp., 1978).

DeMatto challenges the sufficiency of the evidence to support his conviction. The challenge is well taken. We reverse DeMatto's conviction and remand with directions to enter a judgment of acquittal.

Streeter questions the sufficiency of the evidence and, as does Dyar, contests the denial of standing for the suppression of certain testimony as being the fruit of an illegal search. Finally, Streeter and Dyar complain that the indictment charging both conspiracy to possess and to import marijuana was both duplicitous and amounted to double jeopardy. The convictions of Streeter and Dyar are affirmed.

On August 11, 1975, Dyar phoned Robert David Fleming, a government witness and an unindicted co-conspirator, to inquire if Fleming would accept a pilot's position with Memphis Productions, al-

legedly an organization of rock music promoters. The next day Fleming flew to Memphis to see about the job proposition. Dyar and Streeter met Fleming at the Memphis airport and took him to Memphis Quality Inn East.

Upon arrival at the motel, Fleming talked to Gary Pagels and Dyar about the feasibility of transporting rock music groups and hunting expeditions to various destinations, inside and outside the Country. Later on, the subject of marijuana importation came up when Dyar proposed to furnish the necessary cash outlay for the air charter business from profits to be realized from a marijuana run to Colombia, South America. After Fleming had agreed to pilot the aircraft on which the marijuana would be imported, he met DeMatto. DeMatto was introduced as the man with the rock group connections and as the street distributor of the grass but made no comment in response to that description. Following the introduction and after some small talk, DeMatto asked Fleming if he was "going to help out with *this thing*" (Emphasis added). Fleming responded affirmatively. DeMatto "appeared to be pleased" and said that he would be back in touch with Fleming, but was never again in contact with him.

During the marijuana discussions, Streeter was in and out of the motel room.

Later that day, Dyar, Pagels, Neal Perks, and Fleming flew from Memphis to Hamilton, Alabama, to inspect the aircraft which Dyar planned to use in the marijuana run. Fleming concluded that the plane was not airworthy, but he and Perks flew the plane to an airport south of Memphis, where it was impounded by the F.A.A.

Left without a plane, Dyar, Pagels, and Fleming went to Jackson, Mississippi, on August 15 to procure a plane from Hankins Aviation. Pagels and Fleming negotiated the lease of an aircraft for one month. Pagels paid the entire rental price and executed the lease in the name of Memphis Productions, signing in the name of Mark M. Streeter, but Streeter was not there and had not participated in the negotiations.

That evening, Perks and Fleming flew the rented plane to Bekin Airport in Mobile, Alabama, for a rendezvous with Pagels and Dyar. On the next morning, the plane was refueled and some furniture was removed to increase cargo load capacity. All expenses incurred at Bekin were paid in cash by Dyar.

After the modifications were completed, Fleming, Dyar, and Perks took off for Colombia, South America, via Haiti. Radio difficulties developed shortly after take-off and forced Fleming to land at Orlando. When it was discovered that the repairs would take several days, the trip to Colombia was postponed, and Dyar and Perks left the Orlando area.

On Wednesday, August 21, Fleming phoned Pagels to inform him that the radio malfunction had been corrected and to reschedule the flight for Saturday. Again on Friday, Fleming called Pagels. Pagels told him that Perks would join him in Orlando on Saturday and that Dyar would meet them at their destination.

Saturday morning, Fleming and Perks filed a phony flight plan for the Bahamas but flew to Colombia, South America, to pick up a load of marijuana. Upon their arrival, they were greeted by Rick Barker who claimed to be in charge of the Colombian end of the operation.

On Sunday morning, Fleming and Perks departed Colombia and arrived stateside that evening. As instructed by

Barker, they landed the plane at Keystone Heights airport, in Florida, where they left it. They hitched a ride to Gainesville, Florida, where they parted company.

Tuesday morning, Fleming's wife phoned him at work to notify him that officials of the Florida Law Enforcement Agency were en route to arrest him. Fleming immediately called Pagels to advise him that the cops were on their way to arrest him and to tell Pagels the story he would relate to the police. Fleming was arrested and charged with possession of a controlled substance. Fleming posted bail and was released from jail on Wednesday.

On Thursday, Fleming called Pagels to ascertain what steps Memphis Productions would take next.

It was at this point that Streeter reenters the picture. On Friday, Streeter flew to Orlando to see Fleming. Streeter asked Fleming what story had been given to the police, leaving Fleming with the impression that Streeter wanted to ensure the stories were straight and together. Fleming replied that he had told the police that someone from Memphis Productions had loaned the aircraft to two persons for the weekend, that he had given them instructions on flying the plane, had aided them in filing a flight plan, and that he had not since seen or heard from them. Streeter stated that they would abide by that story.

In September of 1976, over one year later, Fleming agreed to testify for the government in exchange for immunity.

On February 9, 1977, a joint indictment was returned against DeMatto, Dyar, and Streeter, along with four other persons, charging them with the offenses of conspiracy to import marijuana and conspiracy to possess marijuana with the intent to distribute. They were tried and convicted on both counts.

I

Sufficiency of the Evidence

a. *Clement DeMatto*

[1] DeMatto claims that because the evidence was insufficient to convict him the District Court erred in the denial of his motion for judgment of acquittal. As to several individuals a conspiracy no doubt existed. Did the proof adequately connect DeMatto with that conspiracy? As indicated at the outset, we think not.

Fleming, the pilot, was the sole witness against DeMatto. According to his testimony DeMatto came by the meeting at the Quality Inn East but he was there for less than ten minutes after the other participants had been discussing rock groups-marijuana transportation for about an hour and a half. Obviously, DeMatto could not have known of the marijuana conspiracy because it had just been agreed upon.

On direct, cross, and re-direct examination, Fleming gave four versions of DeMatto's "introduction" to those present.

His first version was that:

> "He was introduced as Clem and that Clem had connections with a lot of these rock groups and had connections with respect to moving this marijuana after it reached the United States in distributing it."

He was then asked what DeMatto had said to him after the introduction and he responded:

> "Other than some general small talk, the main thing he said was 'are you going to help us out on this thing?' and I said 'yes'."

His second version of what happened was:

"General all around introduction, few familiarities—just general small talk for a few minutes and then finished up with the words to the effect 'well, are you going to help us out on this thing?' and I agreed affirmatively that I would and he said 'well, good. I will be talking to you later on', and he left."

The third version was:

"[I was told] [T]hat his name was Clem and that Clem was the man who was going to help distribute this material when it was brought back to this country."

Fleming then proceeded to say that nothing else "significant" was said that he could recall, that DeMatto did not mention marijuana in connection with helping out with "this thing".

Ultimately, Fleming recited the fourth version:

"At the time Mr. DeMatto was introduced to me it was stated that this was Clem and Clem has a connection with a lot of these rock groups and also has some friends who are going to be in position to distribute this marijuana when we get it back."

After the brief visit to the motel room, DeMatto totally disappears from the case. Fleming testified that he never saw him again, never talked with him on the telephone, that he had no further contact with DeMatto at all.

In conclusion, Fleming was asked if "Clem" ever "told you he was going to do that (participate in the marijuana operation) and he responded, "No, sir".

The government argues that DeMatto's conviction should stand because he remained silent when he was introduced as one who would help with the marijuana distribution and because he asked Fleming if he was going to help with "this thing".

On the question of silence, it must first be noted that according to the first version of the introduction it was merely said that DeMatto had "connections", not that he had agreed to participate in the conspiracy. According to the second version, there was "general small talk for a few minutes", no mention of marijuana. The third version was that Clem "was the man who was going to help distribute this material when it was brought back to this country". This, however, was not an accusing statement with reference to past misconduct; it was a prediction, which, obviously, DeMatto had not agreed to. The fourth version was that "Clem had connections with a lot of those rock groups and had friends who are going to be in position to distribute this marijuana" when the actors got it back. Finally, Fleming admitted that DeMatto had never told him that he was going to participate in the marijuana operations.

[2] It is well established in the law of conspiracy that before being entitled to a conviction the government must prove by the evidence beyond a reasonable doubt not only that a conspiracy did, in fact exist, (as existed here among several of the actors) but also that the defendant knew it and, with that knowledge, agreed to take part in it. Suspicion is not enough and guilty participation in a conspiracy may not be inferred from mere association.

Upon a painstaking review of Fleming's testimony, undertaken in light of the government's burden of proof, but construing the evidence in the light most favorable to the verdict, we are left with the firm conviction that the prosecution wholly failed to carry its burden. It failed to prove that when he entered the room DeMatto knew of the conspiracy

which had been hatched by the other participants within the past thirty minutes. It certainly failed to prove that DeMatto agreed to participate in it.

Fleming did swear that DeMatto asked him if he was going to help them with "this thing"—no elaboration as to whether "this thing" was flying rock groups or importing marijuana or distributing marijuana. Fleming neither quoted nor paraphrased any conversation about marijuana while DeMatto was in the room. To the contrary, he concluded his testimony by saying that DeMatto had never told him that he would help with the marijuana undertaking.

In our view, after this careful analysis of the proof, DeMatto's conviction is supported only by suspicion or a ten minute association with the actual conspirators, or both. This is simply not enough and we cannot, in good conscience, affirm the guilty verdict as one which a reasonably minded jury could have reached from the evidence beyond a reasonable doubt.

b. *Mark Streeter*

[3] The evidence introduced to tie Streeter into the conspiracy consists of the following: (1) that Streeter, along with Dyar, met Fleming at a Memphis airport; (2) that Streeter was in and out of the motel room during the discussions about a marijuana run; and (3) that after Fleming's arrest, Streeter flew to Orlando to discuss with Fleming the alibi given to the police.

Streeter argues that the essence of the discussions held in Orlando is inadmissible hearsay and that the remaining evidence is insufficient to sustain his conviction. Clearly, the testimony disclosing Streeter's meeting Fleming at the Memphis airport and Streeter's on and off presence in the motel room while others were doing the talking was not enough to connect Streeter with the illegal conspiracy. *Causey v. United States*, 5 Cir., 1965, 352 F.2d 203. Unfortunately for Streeter, however, his activities did not stop there. A reasonably minded jury could infer from Streeter's trip to Orlando and his own conversation with Fleming that he most assuredly knew of the conspiracy, that his interest in it exceeded that of an uninvolved bystander, and that he had a vital stake in concealing it.

II

Double Jeopardy

[4] Dyar and Streeter contend that the indictment charging both conspiracy to possess with intent to distribute, 28 U.S.C. § 846, and conspiracy to import marijuana, 21 U.S.C. § 963, was duplicitous; that multiple punishments were imposed for a single offense in derogation of their constitutional guarantee against double jeopardy. Dyar views the indictment, charging conspiracy to import and to possess marijuana, as an attempt to expand a single conspiratorial agreement embracing dual illegal objectives into multiple conspiracies. Using a slightly different phrasing, Streeter claims that he was indicted for two offenses which arose out of the same transaction.

These arguments are rejected on the authority of *United States v. Houltin*, 5 Cir., 1976, 525 F.2d 943, 950, vacated on other grounds, *sub nom Croucher v. United States*, 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 745. *See also, United States v. Houltin*, 5 Cir., 1977, 553 F.2d 991.

Moreover, the appellants received concurrent sentences on the two counts.

III

Standing

Prior to trial, Dyar and Streeter moved to suppress the testimony of Fleming because, they say, Fleming's identity was learned through an illegal search of the airplane which landed in Florida. The District Court concluded that the defendants were without standing to raise the challenge. Dyar and Streeter urge that their proprietary interest in the aircraft conferred standing.

It is well settled that the testimony of a witness whose identity has been discovered through an illegal search must be suppressed "unless the government can show: (1) the identity of the witness originated from an independent source; . . . [or] (2) the identity of the witness discovered from the original illegal seizure has become so attenuated as to remove the original taint", *United States v. Marder*, 5 Cir., 1973, 474 F.2d 1192, 1196.

[5] The decisive factor is whether the complaining individual had a reasonable expectation of privacy in the premises searched or the thing seized. Generally, a defendant will satisfy standing requirements (1) if he has a proprietary or possessory interest in the place searched or the object seized adequate to give rise to a reasonable expectation of privacy, (2) if he was on the premises at the time of the contested search and seizure, or (3) if he is charged with an offense that includes as an essential element, possession of seized evidence, *United States v. Hunt*, 5 Cir., 1974, 505 F.2d 931, *cert. denied*, 421 U.S. 975, 95 S.Ct. 1974, 44 L.Ed.2d 466 (1975); *Accord, Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

Dyar maintains that his accompanying Pagels and Fleming to Jackson to rent the aircraft and his payment for fuel at Bekin Airport in Mobile adequately demonstrates his proprietary interest in the airplane. Streeter points to the presence of his name on the lease of the plane, although he was not there and did not sign the instrument, to indicate his property interest.

[6] Traditional or common law theories of property rights do not automatically confer standing to challenge a search. Property rights in absence of reasonable expectations of privacy in property cannot support a Fourth Amendment claim, *United States v. Hunt, supra.* Ownership or a leasehold interest must be accompanied by a cognizable privacy interest in the place or thing searched, *United States v. Nunn*, 5 Cir., 1976, 525 F.2d 958 (ownership); *United States v. McConnell*, 5 Cir., 1974, 500 F.2d 347 (lease), *cert. denied*, 420 U.S. 946, 95 S.Ct. 1327, 43 L.Ed.2d 424 (1975). In *United States v. Nunn, supra*, we held that a defendant who owned, but who was not driving, a truck when it was seized had no reasonable expectation of privacy and lacked standing to challenge search and seizure of the truck. The facts of *United States v. McConnell, supra*, differ slightly. There the defendant, who paid for the lease of a vehicle which was in the possession of a codefendant, and not of the defendant, when the search occurred, had no expectation of privacy and lacked standing to object to the legality of the search.

[7] Even if we were to assume that Streeter and Dyar had a leasehold interest in the searched aircraft sufficient to create a traditional property right, when they gave possession to Fleming they abandoned any expectation of personal privacy in the aircraft. *See, United*

States v. Mendoza, 5 Cir., 1972, 473 F.2d 692. Streeter and Dyar, therefore, lacked standing to contest the legality of the search.

[8] Not only did Streeter and Dyar fail to satisfy the reasonable expectation of privacy requirement for the Fourth Amendment test of standing, they were not victims of a search or the ones against whom the search was directed. They were merely persons claiming prejudice through the introduction of damaging evidence gathered as a consequence of a search directed at someone else, *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); *Jones v. United States, supra*. "[C]o-defendants and co-conspirators may not assert the Fourth Amendment rights of their alleged partners in crime solely on the basis of their interpersonal association", *United States v. Hunt, supra*, 505 F.2d at 939.

The convictions of Dyar and Streeter are AFFIRMED.

DeMatto's conviction is REVERSED. As to him, the case is remanded for the entry of a judgment of acquittal.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Appendix B

No. 77-5481

D. C. Docket No. 77-45-CR-J-T

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VANCE DYAR, MARK M. STREETER and CLEMENT J. deMATTO,

Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

Before TUTTLE, COLEMAN and CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the convictions of appellants Dyar and Streeter are affirmed; the conviction of appellant DeMatto is reversed, and this cause be, and the same is hereby remanded as to appellant DeMatto to the said District Court in accordance with the opinion of this Court.

JUNE 16, 1978

ISSUED AS MANDATE:

FOR THE FIFTH CIRCUIT

Appendix C

NO. 77-5481

U. S. COURT OF APPEALS
FILED
AUG 9 1978
EDWARD W. WADSWORTH
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VANCE, DYAR, MARK M. STREETER,
and CLEMENT J. DeMATTO,

Defendants-Appellants.

Appeals from the United States District Court for the
Middle District of Florida

ON PETITIONS FOR REHEARING

(August 9, 1978)

Before TUTTLE, COLEMAN and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED

ENTERED FOR THE COURT:

Jas. P. Coleman
United States Circuit Judge